

PREPAID LEGAL SERVICES AND THE CODE OF PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Codes of Ethics, to more fundamental considerations of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era.¹

The above statement by Mr. Justice Harlan Fiske Stone, although made forty years ago, sounds as if it were spoken yesterday in an address on group legal services. While the organized bar has made great progress during the past six years in assisting the growth of group legal services, the concept still generates a great deal of uncertainty and controversy. The practitioner, in search of definite rules and regulations concerning group legal services, is hard put to locate any satisfying and definitive standards.

[T]here is not much doubt that participation in a group legal services program is perilous. An attorney will participate in new programs at the risk of disciplinary action in which he must urge a defense to the charge based on the Constitution.²

The lack of a definite set of standards³ is understandable in light of

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¹ "The Public Influence of the Bar," address by Mr. Justice Harlan Fiske Stone, 1934 (printed in *Preface* to ABA CODE OF PROFESSIONAL RESPONSIBILITY at i (December, 1974)).

² Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"* 48 TEXAS L. REV. 285, 309 (1970).

³ In actuality each state adopts its own code of professional responsibility. Therefore to speak of a single set of standards may be misleading. However, while the Code of Professional Responsibility is not binding on each state bar, in most cases the standards adopted by the American Bar Association [hereinafter, the ABA] are also adopted at the state level. The current Code of Professional Responsibility was adopted by the ABA in 1969. It was amended

the limited experience with prepaid legal services and the changing views of the organized bar, as seen in the amendment of the Code of Professional Responsibility (CPR) in 1974 and then again in 1975.⁴

This article will first discuss the group legal service concept, examine the need for prepaid legal services, and briefly review the recent applicable Supreme Court cases and relevant changes in the CPR. It will then examine several problems which might occur in the daily operation of a prepaid legal service plan in order to illustrate the ambiguities and problems under the CPR.

II. THE PREPAID LEGAL SERVICE CONCEPT: DEFINITIONS

The definition of a prepaid legal service plan provided by the American Bar Association's special committee on prepaid legal services is:

Prepaid legal service means a system in which the cost of possible legal services needed in the future is prepaid in advance by, or on behalf of, a client who receives such services. A plan is usually offered to a group of clients so that the combined payments are pooled, and the principle of spreading the risk between users and non-users is achieved, thereby decreasing the overall cost.⁵

Potentially there are four users of the services: (1) individuals, (2) local groups with a single common interest (*e.g.*, labor unions), (3) multi-unit groups (*e.g.*, all employees of one company), and (4) nationwide groups. All plans now operating or sponsored have been designed to offer services to persons in the second and third categories.⁶

in 1974 and again in 1975. "The CPR [1969 version] has now been adopted, substantially in toto, in 48 states. It is divided into two main divisions: ethical considerations (EC's) and disciplinary rules (DR's). Violation of a disciplinary rule could invoke the sanction of a warning, suspension, or disbarment." ABA, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES, Ethics iii (1973). The ABA intends to publish sometime in 1976 a complete report on the CPR as adopted in each state.

[Editor's Note] The 1975 Amendments to the Code of Professional Responsibility, discussed *infra* were adopted by the Ohio Supreme Court on October 20, 1975. 48 OHIO BAR 1400 (1975).

⁴ Disciplinary Rule 2-103(D), which is the principle section of the CPR governing the operation of group legal services, was first adopted by the House of Delegates of the ABA on August 12, 1969. It was amended during the ABA's meeting in February, 1974. It was amended again in February, 1975. The three versions of the rule are reproduced in notes 41, 48, and 56 *infra*.

⁵ ABA, SPECIAL REPORT TO THE NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, I (1972).

⁶ ABA, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES, Plans iii (1973).

The services in a prepaid legal service plan are provided either by a "closed panel" of lawyers or an "open panel" of lawyers. Closed panel plans are defined as:

Any prepaid legal service plan under which (1) the attorney is the only lawyer whose services are furnished or paid for or (2) the attorney is one of a [selected] panel of lawyers whose services are paid for.⁷

Services under a closed panel plan may be provided by: (1) any lawyer chosen from a group of lawyers designated by the sponsoring organization, (2) a single law firm selected by but independent of the organization, or (3) a salaried lawyer employed by the organization. Open panel plans are those where the recipient has a free choice of lawyers. Services under any open panel plan may be provided by: (1) any lawyer, (2) any lawyer within a limited geographic area, or (3) any lawyer from a panel on which all lawyers may enroll. The scope of services offered under either an open or closed panel plan can vary significantly. The plan may cover only a very limited legal problem or it may cover virtually every conceivable issue that may arise.⁸

III. THE NEED FOR GROUP LEGAL SERVICES

As stated in the Revised Handbook on Prepaid Legal Services, prepared by the American Bar Association:

The Association has long been aware that the middle 70% of our population is not being reached or served adequately by the legal profession. The public fears the cost of legal services. They are frequently not aware of what problems are "legal" and what lawyers can do to solve such problems. They seldom avail themselves of counseling skills of the lawyer to plan for the future or to prevent future difficulty. Their contact with a lawyer occurs only when a crisis situation demands it.⁹

The Supreme Court has required that the indigent criminal defendant receive legal representation mandated by the Constitution.¹⁰

⁷ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 333 (1974).

⁸ For a complete listing and summary of the various plans currently being offered see C. LILLY, *LEGAL SERVICES FOR THE MIDDLE MARKET*, (1974).

⁹ ABA, *REVISED HANDBOOK ON PREPAID LEGAL SERVICES*, 2 (1972).

¹⁰ *Powell v. Alabama*, 287 U.S. 45 (1932), held that legal counsel must be provided for those who cannot afford it in all capital cases. This right was expanded in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to include right to counsel in any case involving the possibility of incarceration for more than six months. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), held that an indigent could not be incarcerated for any period of time if he was not advised of his right to a court appointed attorney.

Juveniles too have received similar protection by the Supreme Court.¹¹ While this has helped attain the American Bar Association's goal of making legal services fully available,¹² until recently, not much recognition has been given to the problem of obtaining legal services for the middle income segment of our society. It is that class of individuals, whether blue collar or white collar, that finds it difficult to pay for legal services. That class would be the primary beneficiary of group legal services.¹³

It has been suggested that the legal profession, given its traditional structure of lawyer-client relationship, lacks the kind of organization to provide the full range of legal services required by society.¹⁴ Jules Bernstein, Associate Counsel of the Laborer's International Union of North America, whose Local participated in the Shreveport experimental prepaid legal service program,¹⁵ outlined the institutional shortcomings in this area.

First, except for automobile and personal liability insurance, there is no institutionalized method for obtaining advance protection against unexpected legal costs. This has meant that the client has had to bear the burden of paying for legal services at or near the time of their rendition. Second, it is often difficult for moderate income citizens to determine the existence or nature of their legal problems or to find lawyers competent or willing to deal with them.¹⁶

¹¹ *In re Gault*, 387 U.S. 1 (1966).

¹² ABA, CODE OF PROFESSIONAL ETHICS (1969).

Ethical Consideration 1-1:

A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

Ethical Consideration 2-1:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

¹³ Wolff, *Prepaid Legal Services*, 22 *DRAKE L. REV.* 687 (1973).

¹⁴ *NEW CAREERS IN LAW: A REPORT OF THE ADMINISTRATION OF JUSTICE PROGRAM*, 48 (1969).

¹⁵ The Shreveport Plan was the first ABA approved group legal service program. For a full report see *SHREVEPORT BAR ASSOCIATION, PREPAID LEGAL SERVICE PLAN: A COMPILATION OF THE BASIC DOCUMENTS* (1973).

¹⁶ Bernstein, *Legal Services, the Bar and the Union*, 58 *A.B.A.J.* 472 (1972).

Numerous surveys have been conducted to determine the extent of unfulfilled legal needs, what groups of people are most severely affected and the reasons for the failure to satisfy these legal needs. However, the usefulness of these surveys has been questioned.¹⁷

The following comments of two authors experienced in the area of prepaid legal service plans indicate the current state of knowledge on this subject. Preble Stolz, in *The Legal Needs of the Public: A Survey Analysis*, stated:

The belief that there is a vast unfilled need for legal services in the middle class is nothing more than an article of faith. It may well be true, but no existing study proves it.¹⁸

In response to this claim, Claude C. Lilly, in *Legal Services for the Middle Market*, writes:

The situation does not require the amount of faith that Preble Stolz indicates even though the extent of legal need is an unknown quantity. Many writers have vouched for the existence of this need; none have measured it.¹⁹

The above quotations indicate that the debate is still alive and for good reason! Not enough evidence is yet available, although the ABA is currently undertaking an indepth statistical study of the matter.²⁰

IV. FROM *Button* to *United Transportation Union*

The recent growth of prepaid legal service plans can be traced to the United States Supreme Court's decision in *NAACP v. Button*.²¹ In *Button* the NAACP sought to enjoin enforcement of a Virginia statute which prohibited an attorney from accepting employment from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability at stake. Conduct of this sort by an attorney was barred by the statute as illegal solicitation. The NAACP, in an attempt to eliminate discrimination, encouraged the institution of suits to challenge racial discrimination, and it

¹⁷ For a brief outline of the various surveys see ABA, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES, Chapter 1 (1973).

¹⁸ P. STOLZ, THE LEGAL NEEDS OF THE PUBLIC: A SURVEY ANALYSIS, 1 (1968).

¹⁹ C. LILLY, LEGAL SERVICES FOR THE MIDDLE MARKET, 11 (1974).

²⁰ B. CURRAN and F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC: A PRELIMINARY REPORT OF A NATIONAL SURVEY BY THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS OF THE AMERICAN BAR ASSOCIATION IN COLLABORATION WITH THE AMERICAN BAR FOUNDATION, (1974).

²¹ 371 U.S. 415 (1963).

selected and paid for legal representation in each case. The court held that the Virginia statute that prohibited this conduct violated the first and fourteenth amendments.

One year later the Court applied the principles of *Button* to the activities of a labor union in *Brotherhood of Railroad Trainmen v. Virginia*.²² The Virginia Bar charged that the union's legal plan constituted the unauthorized practice of law and solicitation of legal business. The union, through its legal counsel, would assist injured members or their families in finding an attorney to represent them in work-related accident cases. The Court stated:

[T]hat the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employer's Liability Act. . . .²³

The Court went on to indicate that a state did have the power to regulate the legal profession but could not infringe upon the rights of the individual in so doing.²⁴ The union activities involved were not the commercialization of the legal profession or ambulance chasing.²⁵ As the state failed to show any substantial regulatory interest, it could not prohibit the union's activities.

That philosophy of the Court in *Button* and *Railroad Trainmen* was expanded further in *United Mine Workers v. Illinois Bar Association*.²⁶ In this case, the Illinois Bar Association attempted to enjoin the employment of a salaried attorney by the union to represent its members in prosecuting workmen's compensation claims. The state supreme court prohibited such activity as unauthorized practice of law, holding that *Button* was limited to political activity and *Railroad Trainmen* involved recommending attorneys, but not employing them. The United States Supreme Court refused to accept either of these distinctions and held that both *Button* and *Railroad Trainmen* were applicable, outlining its reasoning as follows:

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose,

²² 377 U.S. 1 (1964).

²³ *Id.* at 5.

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ 389 U.S. 217 (1967).

with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable". *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).²⁷

The result of these three decisions would seem to be that a state cannot prevent a group from organizing to protect its members' legal rights. Even though the state does have a legitimate interest in regulating the professional conduct of attorneys so as to protect the client and the profession, it apparently cannot prohibit the right to organize with respect to providing legal services to its members by claiming that the client's interest *might* be sacrificed or that the profession *might* be injured. Therefore, while the state can prohibit or punish conduct which is within the scope of its regulatory powers (e.g., a lawyer actually sacrificing his client's interest), it cannot infringe upon constitutionally protected rights even though the activity might involve conduct within the state's control.

The latest and strongest statement by the Supreme Court in this area was in *United Transportation Union v. State Bar of Michigan*.²⁸ In that case, the Michigan Bar Association attempted to prohibit a union from recommending selected attorneys to its members and their families. The attorneys selected were those whom the union had found competent and who had agreed not to charge in excess of twenty-five percent of the recovery in FELA actions.²⁹ The Michigan Supreme Court granted judgment for the bar association,³⁰ after giving the decision in *Railroad Trainmen* "the narrowest possible reading."³¹ Justice Black stated that the Michigan court erred in giving *Button*, *Railroad Trainmen* and *United Mine Workers* such a

²⁷ *Id.* at 222.

²⁸ 401 U.S. 576 (1971).

²⁹ *Id.* at 577.

³⁰ *State Bar of Michigan v. Bhd. of R.R. Trainmen*, 383 Mich. 201, 172 N.W.2d 811 (1970).

³¹ *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 579-80 (1971).

narrow reading. The final paragraph of the decision leaves little doubt regarding the Supreme Court's intent in this area:

In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP v. Button*, *Trainmen* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.³²

Whatever doubt may have existed as to the state's power to totally prohibit group legal services appears to be erased.

The Supreme Court has provided the test—only if a state can show a substantive evil endangering the profession's standards will it be permitted to restrict first and fourteenth amendment rights and the constitutionally guaranteed organizational freedom of members of the community to unite in order to secure legal services.³³

Two things are certain: (1) certain group legal services are here to stay; (2) the Supreme Court has not abrogated the canons to establish these services. The conclusion is simply that group legal services can be provided without sacrificing the necessary ethics of the legal profession. *The two interests can and must coexist.*³⁴

V. THE CODE OF PROFESSIONAL RESPONSIBILITY

Prior to the adoption of the 1969 CPR, Canon 35 of the Canons of Ethics prohibited a lawyer from accepting employment from an organization and providing services to its members.³⁵ Coupled with

³² *Id.* at 585-86.

³³ Comment, *Group Legal Services and the New Code of Professional Responsibility*, 20 BUFFALO L. REV. 507, 515 (1971).

³⁴ Note, *Group Legal Services: The Ethical Traditions and the Constitution*, 43 ST. JOHN'S L. REV. 82, 85 (1968) (emphasis added).

³⁵ ABA CANONS OF PROFESSIONAL ETHICS No. 35 (1908)(date adopted by ABA): The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such

Canon 35 was Canon 47 which prohibited a lawyer from aiding in the unauthorized practice of law.³⁶ Together, these Canons made the emergence of prepaid legal service programs almost impossible.³⁷ Canon 27, which limited advertising, and Canon 28, which discouraged "the stirring up to litigation," were also used to stifle the growth of group legal services.³⁸

intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

³⁶ *Id.* No. 47 (1908)(date adopted by ABA):

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

³⁷ See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 31 (1931); *Id.* No. 35 (1931); Each of the foregoing opinions cite Canon 35 and the use of lay intermediaries in the furtherance of the unauthorized practice of law. See also *Id.* No. 56 (1931); *Id.* No. 98 (1933); *Id.* Informal Opinion No. 469 (1961); *Id.* Informal Opinion No. 970 (1966); *Informative Opinion of the Committee on the Unauthorized Practice of Law*, 36 A.B.A.J. 677 (1950). Each of the foregoing are examples of decisions striking down early forms of group legal services.

³⁸ ABA CANONS OF PROFESSIONAL ETHICS Nos. 27 and 28 (1908) (date adopted by ABA): Canon 27:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended; with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; foreign language ability; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented.

Canon 28:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It

The advent of *Button*, *Railroad Trainmen*, and *United Mine Workers* obviously required a change in the Canons of Ethics. In August, 1964, the American Bar Association began a revision of its Canons of Ethics resulting in the 1969 Code. The American Bar Association published a preliminary draft of the CPR in January, 1964³⁹ which clearly allowed lawyers to cooperate with certain organizations in making group legal services available.⁴⁰ However, the draft provision that allowed prepaid legal services was not accepted by the House of Delegates. As finally adopted on August 12, 1969, the applicable section of the CPR, DR2-103(D)(5)⁴¹ was brief and vague.

is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attaches* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

³⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY (Special Committee on Evaluation of Professional Ethics, ABA January 15, 1964 Draft).

⁴⁰ *Id.* DR2-102(A):

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . .

2. A lawyer may accept employment that results from participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are operated or sponsored by

. . .

c. A professional association, trade association, labor union, or other bona fide, non-profit organization which, as an incident to its primary activities, furnishes, pays for, or recommends lawyers to its members or beneficiaries.

⁴¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5) (1969).

A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

Rule 2-103(D)(5) was framed to meet the ethical problems of the legal services under *Button, Brotherhood of Railroad Trainmen* and *United Mine Workers* and was adopted prior to the broader scope of the First Amendment protection set down by *United Transportation Union*. As a result the attempted limitation of legal service plans in this provision may no longer be possible.⁴²

In 1974, the American Bar Association adopted what has come to be called the Houston amendments. These amendments to the CPR revoked the language restricting a lawyer's cooperation with group legal services. In response to the Houston amendments, ABA President Chesterfield Smith stated:

It is crystal clear after the debate in Houston that the ABA now affirmatively encourages both open and closed panels as appropriate devices for the delivery of legal services, both in prepaid legal service plans and in government funded legal aid for the poor. At the same time the Association clearly indicated for the first time its belief that closed panels can be structured so that professional standards can be fully maintained.⁴³

Prior to 1974, the CPR *generally* prohibited any attorney from promoting or assisting another in the promotion of his services.⁴⁴ Since, by definition, an open panel does not involve the promotion of an individual attorney or firm it has been held that such a plan did not violate the rules set out in the 1969 CPR.⁴⁵ However, the Ethics Committee of the American Bar Association held that closed

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

⁴² Comment, *Advertising, Solicitation and Prepaid Legal Services*, 40 TENN. L. REV. 439, 463 (1973).

⁴³ President's Page, 60 A.B.A.J. 369, 394 (1974).

⁴⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1969):

A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR2-103.

See also DR 2-103(D), *supra* note 41.

⁴⁵ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 332 (1973).

panel plans involve the promotion of a particular attorney or firm. A closed panel plan means that the organization has selected a single lawyer or firm to provide the legal services for the organization's members. Therefore, by providing services under such a plan, the lawyer is cooperating in the promotion of his services.⁴⁶ The 1969 CPR did allow for the existence of closed panel plans; yet, such plans were subject to limitations set forth in DR2-103(D)(5) that open panel plans did not have to meet.⁴⁷ That language in the CPR did not change significantly in 1974.⁴⁸ In fact, the provisions in the 1974 CPR

⁴⁶ *Id.* No. 333 (1974).

⁴⁷ DR 2-103(D), *supra* note 41.

⁴⁸ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D) (1974).

(D) A lawyer shall not knowingly assist a person or organization that furnishes, or pays for legal services to others, to promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as permitted in DR 2-101(B). However, this does not prohibit a lawyer, or his partner, or associate, or any other lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, from being employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, if his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other organization that furnishes, renders, or pays for legal services to its members or beneficiaries, provided the following conditions are satisfied:

(a) As to such organizations other than a qualified legal assistance organization:

(i) Such organization is not organized for profit and its primary purposes do not include the recommending, furnishing, rendering of or paying for legal services.

(ii) Said services must be only incidental and reasonably related to the primary purposes of such organization.

(iii) Such organization or its parent or affiliated organization does not derive a profit or commercial benefit from the rendition of legal services by the lawyer.

(iv) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

(v) Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by the client, then such organization, if it customarily provides legal services through counsel it pre-selects, shall promptly reimburse the member or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.

(vi) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

Amendments served to further restrict the existence of closed panel plans as opposed to open panel plans. The 1974 Amendments set out nine restrictions⁴⁹ that must be met if the group is not a "qualified legal assistance organization," but it sets out only four restrictions⁵⁰ that must be met if the group is a "qualified legal assistance organization."

A qualified legal assistance organization was defined in 1974 by the CPR in Definitions No. 8 as:

An organization described in DR2-103(D)(1) through (4) or which recommends, furnishes, renders or pays for legal services to its members or beneficiaries under a plan operated, administered or funded by an insurance company or other organization which plan provides that the members or beneficiaries may select their counsel

(vii) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

(viii) The articles of organization, by-laws, agreement with counsel, and the schedule of benefits and subscription charges are filed along with any amendments or changes within sixty days of the effective date with the court of other authority having final jurisdiction for the discipline of lawyers within the state, and within sixty days of the end of each fiscal year a financial statement showing, with respect to its legal service activities, the income received and the expenses and benefits paid or incurred are filed in the form such authority may prescribe.

(ix) Provided, however, that any non-profit organization which is organized to secure and protect Constitutionally guaranteed rights shall be exempt from the requirements of (v) and (viii).

(b) As to a qualified legal assistance organization (not described in DR 2-102(D)(1) through (4)):

(i) The primary purpose of such organization may be profit or non-profit and it may include the recommending, furnishing, rendering of or paying for legal services of all kinds.

(ii) The member or beneficiary, for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in the matter.

(iii) Such organization is in compliance with all applicable laws, rules of court and other legal requirements that govern its operations.

(iv) The lawyer, or his partner, or associate, or any other lawyer affiliated with him or his firm, shall not have initiated such organization for the purpose, in whole or in part, of providing financial or other benefits to him or to them.

⁴⁹ *Id.* DR 2-103(D)(5)(a).

⁵⁰ *Id.* DR 2-103(D)(5)(b).

from lawyers representative of the general bar of the geographical area in which the plan is offered.⁵¹

It is clear from the above definition that only open panel plans would qualify and, therefore, be subject to fewer restrictions. Probably the most restrictive qualification imposed on closed panel plans is DR2-103(D)(5)(a)(v), which effectively turns all closed panel plans into open panel plans by requiring the plan to pay the member's legal fees if he should choose to select another attorney.⁵² Furthermore, DR2-104(A)(3) of the Houston amendments stated that a lawyer who cooperates with a closed panel plan cannot accept employment from a beneficiary of the plan if the service is not covered by the plan.⁵³

Because of the discriminatory treatment of closed panel plans, the Anti-Trust Division of the federal government was critical of the Houston amendments. Bruce B. Wilson, Deputy Assistant Attorney General, Anti-Trust Division, Department of Justice stated:

The Supreme Court in *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971) has prohibited state action that denies "associations of workers or others the means of enabling their members to meet the cost of legal representation." Accordingly, disciplinary rules cannot lawfully prohibit participation in closed panel plans sponsored by labor unions, consumer groups, or others. If in modifying the disciplinary rules to permit participation in both open and closed panel plans, the state bar discriminates in favor of open plans, an anti-trust problem could arise.⁵⁴

Whether the American Bar Association again amended the CPR because it realized that the Code could not withstand judicial scrutiny in light of *United Transportation Workers v. State Bar of Michigan* or because of the Anti-Trust Division's campaign is not clear. In any event, the CPR was again amended in February, 1975 and a new set

⁵¹ *Id.* Definition No. 8.

⁵² *Id.* DR 2-103(D)(5)(a), *supra* note 48.

⁵³ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104(A)(3) (1974):

A lawyer who is recommended, furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein. A lawyer whose legal services are currently being recommended, furnished or paid for by a legal assistance organization defined in DR 2-103(D)(5)(a) may not accept employment as a private practitioner from a member or beneficiary or such a legal assistance organization in any matter not covered by the benefits provided under the plan of such organization when such member or beneficiary has been his client under such plan.

⁵⁴ Wilson, *Justice Department and Other Views on Prepaid Legal Services Plans Get An Airing Before the Tunney Subcommittee*, 60 A.B.A.J. 791, 792 (1974).

of rules was adopted, abandoning the discriminatory impact of the Houston amendments. The discrimination was eliminated by changing the definition of a "qualified legal assistance organization," in Definitions No. 8 (1975 amendments) to read: "Qualified assistance organization means an office or organization of one of the four types listed in DR2-103(D)(1) - (4), inclusive that meets all the requirements thereof."⁵⁵ Since DR2-103(D)(4) includes any "bona fide organization," it is clear that both open and closed panel plans can fit into the above definition.⁵⁶ Consequently, the restrictions applying

⁵⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Definitions No. 8 (1975).

⁵⁶ *Id.* DR 2-103(D):

A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or its beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organi-

to a qualified legal assistance organization now apply equally to both open and closed panel plans.

VI. PROBLEMS RAISED UNDER THE CPR

The foregoing makes it clear that cooperation between an attorney and a prepaid legal service plan is now sanctioned by the CPR. With that settled, how does one initiate and manage such a plan so as to remain within CPR boundaries? It appears to be no easy task, even assuming that the given disciplinary authority fully recognizes the group legal service concept. The CPR is by necessity very broad. Consequently, answers to specific day to day problems are still elusive even after a great deal of research and thought has been given to the CPR requirements.

This section of the article will discuss several problems which might be experienced by an attorney attempting to establish and maintain a prepaid legal service plan. Since it is impossible to discuss the CPR of each state, the following discussion will relate to the 1969 CPR and its 1975 amendments of the ABA. It is the writer's opinion that the 1975 amendments will set the standard for most states as each one considers this problem in the near future.

A. Eligible Groups

Under both the 1969 CPR and 1975 amendments a lawyer may cooperate only with a *group* when providing prepaid legal services. However, the difference between the CPR as originally drafted and as amended in 1975 is the type of group with which an attorney may cooperate. In 1969, DR2-103(D)⁵⁷ limited group legal services to profit organizations, and only if the primary purpose of the organization did not include the rendition of legal services.⁵⁸ In addition, the rendition of the legal services had to be "incidental and reasonably related to" the primary purpose of the organization⁵⁹ and the organi-

zation is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

⁵⁷ DR 2-103(D)(5), *supra* note 41.

⁵⁸ DR 2-103(D)(5)(a), *supra* note 41.

⁵⁹ DR 2-103(D)(5)(b), *supra* note 41.

zation could not receive any financial benefit from the rendition of legal services.⁶⁰

It is very difficult to ascertain the meaning of the term "reasonably related" to the organization's primary purpose. Little help is available from the ABA or reported cases. For example, in 1972, the Ethics Committee of the American Bar Association held that a union could hire an attorney to represent its members who found their paychecks subject to garnishment or attachment proceedings.⁶¹ The committee stated that "[c]ollective activity undertaken to obtain meaningful defense against garnishment of wages, as well as against claims that may lead to garnishments, is as a practical matter, inextricably interrelated with one of the primary functions of a union, namely job protection."⁶² Such a narrow case provides little assistance. The four Supreme Court cases discussed above do not provide much more guidance. In *Button*, the activity involved civil rights litigation sponsored by the NAACP; in *Railroad Trainmen* and *United Transportation Union* the facts centered around FELA actions; *United Mine Workers* concerned workman's compensation claims. One who is operating under the 1969 Code would therefore have to rely upon the broad language at the end of the decision in *United Transportation Union*⁶³ to support any plan that offered a broad scope of legal services.

The 1975 amendments removed many restrictions upon sponsoring organizations found in the 1969 CPR. First, DR2-103(D)(4)⁶⁴ allows a lawyer to cooperate with any "bona fide organization." The comments state that:

The words "bona fide" were added before "organization" in the first line to enable the standing committee, if the need arises, to determine whether a lawyer working for a purported qualified legal assistance organization is working for one that is really organized and acting as such in good faith.⁶⁵

Pursuant to DR2-103(D)(4)(a) of the 1975 amendments,⁶⁶ the organization may be either profit or non-profit. If the organization is organized for profit, however, ". . . the legal services [may not be] rendered by lawyers employed, directed, supervised, or selected by it [the

⁶⁰ DR 2-103(D)(5)(c), *supra* note 41.

⁶¹ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION, NO. 1229 (1972).

⁶² *Id.*

⁶³ *Supra* note 32.

⁶⁴ *Supra* note 56.

⁶⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Comments to DR 2-103(D)(4) (1975).

⁶⁶ *Supra* note 56.

organization] except in connection with matters where such organization bears ultimate liability for its member or beneficiary."⁶⁷ Second, the language in the 1969 Code which prohibits the organization from being organized for the primary purpose of providing legal services is eliminated by the 1975 amendments. The 1975 amendments only prohibit the organization from being organized "for the primary purpose of providing financial or other benefits to such lawyer."⁶⁸ The comments to this rule indicate that the lawyer could even go so far as to help form the group so long as it was done to benefit the public and not to further the lawyer's own selfish interest.⁶⁹ Closely related to DR2-103(D)(4)(b) is DR2-103(D)(4)(c) which prohibits the intentional use of the organization as a feeder for the private practice of the lawyer.⁷⁰ This section does not prohibit the lawyer from accepting employment that resulted as a referral from a plan member, but only prohibits the intentional use of the group as a feeder.

B. Solicitation

Probably the first problem which arises in the creation of a group legal service plan is the initial contact between lawyer and layman. DR2-101(A), which has remained unchanged since 1969, provides:

A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients, as used herein, public communication includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine or book.⁷¹

Equally Important is DR2-103(A), which also has remained unchanged since 1969. DR2-103(A) provides "[A] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."⁷² These two sections make it clear that the lawyer cannot contact the layman, whether group or individual, regarding the employment of his legal services. The

⁶⁷ DR 2-103(D)(4)(a), *supra* note 56.

⁶⁸ DR 2-103(D)(4)(b), *supra* note 56.

⁶⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Comments to DR 2-103(D)(4)(b) (1975).

⁷⁰ *Supra* note 56.

⁷¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(A) (1969 and 1975).

⁷² *Id.* DR 2-103(A).

lawyer-client relationship must be initiated by the client and no exception to this rule is given in connection with prepaid legal services.

The ABA, as indicated above,⁷³ recognized that the middle seventy percent of our population is not being reached or served adequately. Prepaid legal services is a vehicle which could help eliminate this gap. However, unless the groups needing the representation are made aware of the existence of the plans, the gap in legal services will continue. Since attorneys are prohibited from soliciting people for prepaid legal services and the whole concept is novel, some vehicle must be found to educate the public regarding prepaid legal services. In this regard, Bruce B. Wilson, Assistant Attorney General, of the Anti-Trust Division of the Department of Justice stated:

First, any plan, in order to be successful, obviously must be promoted. To allow the promotion of the plan, it would seem that a number of changes in the ordinary disciplinary rules will be needed. . . . Unless groups of employers, employees and consumers are made aware of the existence of plans, charges and procedures, there is little chance that they will be widely used.⁷⁴

One area in which the education program is making progress is with the labor unions. Labor unions have efficient means to disseminate information to their members and have been doing so in the area of prepaid legal services on both the local and national level. In 1973, Section 302(c) of the Labor Management Relations Act of 1947 was amended to allow for prepaid legal services to be a subject of labor-management contract negotiations. This undoubtedly will result in more unions becoming aware of and interested in the possibility of such services. It will also increase the participation in plans by individual union members when employers will pay for this service, just as they now do for group health insurance.

While this legislation may serve the purpose of educating labor unions, it does nothing for consumer organizations, neighborhood organizations, and many others that are in a position to take advantage of the services. If these groups remain ignorant of the concept and its possibilities, the potential use of prepaid legal services will never be fully recognized. Bar associations have traditionally prohibited lawyers from soliciting business so as to maintain the dignity of the profession and protect the client from potentially overbearing practitioners. While these goals are laudable, they frustrate the goal of making legal services fully available. Consequently, the national,

⁷³ See text at *supra* note 9.

⁷⁴ Wilson, *supra* note 54, at 792.

state or local bar associations must assume the responsibility of formulating a campaign to make the public aware of the availability of prepaid legal services. Bar associations have both the resources and the expertise to initiate such a program. A program on the state or local level could be conducted through the Bar Association's Office of Counsel or its Committee on Prepaid Legal Services. In this way individuals experienced in the practice of law, the needs of the community and the CPR could present the program without promoting any individual lawyers. Such a program would both educate the public in the availability and use of group legal services and avoid violating the Disciplinary Rules prohibiting solicitation for an individual attorney.

C. Presentation of Plan to the Group

How does the CPR restrict the presentation of a prepaid legal service plan to the representative or governing board of a group and later to the group members themselves? Presentation to the group representative does not raise any ethical problems that are different than those faced by a lawyer engaged in the traditional areas of law practice. Assuming that the organization's representative was favorably disposed toward the plan, he would report his findings to the group's governing board and might request the lawyer make a presentation to the organization's membership. At this point, numerous problems arise. For example, can the attorney accept such an invitation? If he accepts the invitation, can he do anything more than describe the plan? Can he distribute literature? Can he discuss the qualifications of the firm? These are only some of the questions he must consider before accepting the invitation.

While neither the 1969 CPR nor the 1975 amendments specifically speaks to the invitation question, one can find some support for a decision to accept. DR2-104(A)(4) of the 1969 CPR, which was not changed by the 1975 Amendments, states that "[w]ithout affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice."⁷⁵ However, it may be argued that since he is not accepting the invitation merely to educate the public, but rather to present a plan in hope the union will accept, he is in violation of DR2-101(A).⁷⁶ The attorney must also consider DR2-103(C),⁷⁷ which

⁷⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104(A)(4) (1969 and 1975).

⁷⁶ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(A) (1969 and 1975): A lawyer

prohibits an attorney from using a person or organization to promote his services. In 1969, there was no exception to this rule for group legal service plans. As a result of the 1975 amendments, an attorney is exempted from its operation if he is cooperating with a qualified legal assistance organization. However, when the group the attorney is addressing has not yet adopted any such plan, it is an interesting question as to whether he could use this section to justify his presentation. The determination of a violation may well turn not on whether he accepts the invitation, but on the substance of his presentation. If his presentation is structured in such a fashion that it educates the group as to plan content rather than promoting his own services, it is likely that there is no violation of any rule. The same reasoning would probably govern the lawyer's decision to distribute literature. Again, if the literature is designed to educate rather than promote services, the lawyer would not be in violation of the rules.

While the lawyer can control the content of his presentation and the literature he chooses to distribute, it is difficult for him to control what questions the members might ask. This may not be a very serious problem if he is invited only as a source of public information. However, more likely he will be invited to discuss prepaid legal services because the organization is considering both entering into a contract for legal services and entering into such an agreement with that lawyer. It must be remembered at this stage that no contract has been

shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

" ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(C) (1969): "A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto." *Id.* (1975):

A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:

- (1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.
- (2) He may cooperate with the legal service activities of any of the officers or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:
 - (a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
 - (b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

made. Yet, it is absurd to think the group members will elect to enter into an agreement without inquiring into the qualifications of the lawyer or his firm. How is he to answer these questions? He might approach the problem by only answering those questions that are limited to the size of the firm, background, and type of practice. By answering only questions that require objective answers, he would not be recommending his own employment, emphasizing his professional experience or reputation or communicating self laudatory remarks.⁷⁸ In any event, the problems are obviously not easily solved either under the 1969 or 1975 rules.

While the foregoing section reaches some conclusions to the problems presented, the answers are less than satisfactory because they are mere speculation. Lawyers will be reluctant to participate in any program where they cannot be sure that their conduct is sanctioned by the Disciplinary Rules. If attorneys are forced to speculate about the Disciplinary Rules as applied to prepaid legal services, there will be a chilling effect and the result will limit the growth of prepaid legal services. Therefore, even if the eligible organizations are fully aware of the concept of prepaid legal services, the growth of such plans will be limited because there may not be a sufficient number of lawyers available to provide the necessary services, and the group will be limited to selecting lawyers from that small group willing to speculate as to the limitations of the Disciplinary Rules. This latter factor will also limit the scope of the services provided by each plan as the group will be denied the opportunity to draw from all the legal expertise in the community.

To eliminate the ambiguity in this area, it is necessary to promulgate definite guidelines that outline what the lawyer can and cannot do at each stage of the development of a prepaid legal service plan. The rules as currently structured are unsatisfactory because they deal with a lawyer-client relationship that is in many ways very different from that created by prepaid legal service plans. A representative of the Anti-Trust Division of the Department of Justice has stated "[d]oes it make sense, for example, to apply the ordinary and traditional rules in such areas as advertising to delivery vehicles which bear no resemblance to the traditional legal service delivery systems?"⁷⁹ While it has often been felt that the Disciplinary Rules must be very broad in nature so as to deal with the various ethical problems encountered in the practice of law, a more narrow set of guidelines

⁷⁸ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A) (1969 and 1975).

⁷⁹ Sims, *Competition at the Bar*, 61 A.B.A.J. 1069 (1975).

would be practical in this area because their applicability would be limited to prepaid legal service plans. The suggested regulations must clearly allow the lawyer to address a group and outline the permissible limitations of that presentation. At a minimum, the lawyer must be allowed to give to the group sufficient biographical information about his firm to enable the group membership to evaluate and investigate both the program and the lawyer. The bar association could control this facet of the program by providing a biographical format that the lawyer must use when communicating this information to the group.

D. Presentation of the Plan to All Group Members

The next series of problems occur after the group agrees to enter into a prepaid legal services contract. As mentioned earlier, the scope of these services and their cost are matters of negotiation. However, under the 1969 CPR and the 1975 amendments, it must be understood by both the group and the lawyer that the individual member is the client and not the organization.⁸⁰ An additional limitation provided in the 1975 amendments requires that:

Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.⁸¹

DR2-103(D)(4)(g) of the 1975 amendments also requires that once the plan is adopted

Such organization [must file] with the appropriate disciplinary authority at least annually a report with respect to its legal plan, if any, showing its terms, its schedule of benefits, its description charges, agreements with counsel, and financial results of its legal service activities or if it has failed to do so, the lawyer [must] not know or have cause to know such failure.⁸²

⁸⁰ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5)(d) (1969), *supra* note 41; ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(4)(d) (1975), *supra* note 56.

⁸¹ *Id.* DR 2-103(D)(4)(e), *supra* note 56.

⁸² *Id.* DR 2-103(D)(4)(g), *supra* note 56.

The first major problem confronting the lawyer is in knowing the permissible limits of communicating with the group members. Initially, one might not think this is a problem, yet experience has shown that many times a large portion of the group membership is unaware of the plan benefits available. They are entitled to have that information. As originally drafted in 1969, the CPR gave little or no guidance in this area. In 1969, DR2-101(B) provided:

A lawyer shall not publicize himself, nor his partner, or his associates as a lawyer through a newspaper or magazine advertisement, radio or television announcements, display advertisements in city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted in DR2-103.⁸³

DR2-103(D) of the 1969 CPR stated:

A lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to promote the use of his services or those of his partner or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following: . . .⁸⁴

DR2-103(D)(5) refers to non-profit organizations that recommend, furnish or pay for legal services to its members. Therefore, under these Rules an attorney may cooperate in a dignified manner with a prepaid legal service organization relative to informing the members of the availability of legal services. The difficulty is clear. What activity does the word "dignified" include?

The 1975 amendments and comments are helpful in this area. DR2-101(B) provides:

A lawyer shall not publicize himself, or his partner, or his associates, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisement, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

⁸³ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1969).

⁸⁴ *Id.* DR 2-103(D), *supra* note 41.

This rule does not prohibit limited and dignified identification of the lawyer as a lawyer as well as by names:

. . . .
(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR2-102(A)(6), directed to a member or beneficiary of such organization.⁸⁵

As quoted above, DR2-101(B) sets the boundaries within which the lawyer must remain. It may be this is not really anything different than was allowed in the 1969 CPR. The comments to DR2-101(B) of the 1975 amendments seem to support this conclusion.

While the practice permitted by the second sentence and subdivision (6) would not be improper under the code anyway, they are included so as to make it entirely clear that qualified legal assistance organizations may engage in dignified commercial publicity, provided that information about individual lawyers is disclosed only in communications directed to members or beneficiaries of such organizations.⁸⁶

While the 1975 amendments clear up many of the existing problems, they are too recent to be adopted by most of the states. Consequently, lawyers who intend to participate immediately in prepaid legal service plans still must consider the 1969 CPR. The 1975 amendments provide little assurance to the practitioner who is subject to the original CPR. Therefore, we are faced with the same problem discussed earlier; namely, that as the lawyer is without a definite set of guidelines, he will be reluctant to participate in any prepaid legal service plan.

At this point it should be noted that some plans provide for mandatory membership once the agreement is executed between the group and the lawyer. Under such a plan the lawyer need not concern himself with soliciting membership, for the agreement already provides that all members of the group will enroll in the prepaid legal services plan. Other plans, however, provide that the individual member has an option to join the plan after the agreement is executed between the group and the lawyer. It is this latter situation that creates most of the ethical problems and which will be the focus of the following discussion.

DR2-101(B), as amended in 1975, does not resolve all of the ambiguity. The rule states that identification of the lawyer by name is prohibited. Yet subsection 6 allows identification of the lawyer by

⁸⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1975).

⁸⁶ *Id.* Comments to DR 2-101(B).

name together with biographical information. The regulation still leaves too much room for interpretation by the practitioner. Again, definite standards should be provided, establishing precisely what the communications may and may not contain. While it is helpful to allow for the identification of the lawyer, more important is the need for the promotion of the plan itself. At this stage, although a contract between the group and the attorney has been executed, the individual member has not as yet made his decision to participate in the plan. In order to make an informed decision, he needs full disclosure of the plan's services and advantages. If the lawyer in cooperation with the group is limited to presenting only the services provided by the plan instead of being able to promote the advantages of joining the plan, individuals may ignore the opportunity until a need arises. This presents a critical problem for the plan, and will exclude coverage of pre-existing problems. Under such a situation the individual may want the practitioner to provide the necessary services at full cost and then join the plan for future needs. This may be construed as a feeder, which is prohibited by the CPR.

An additional problem occurs in contacting the individual when the individual's membership expires. Can the lawyer at this time notify him of the fact that he is no longer covered by the plan? This presents a problem because at this time the individual is no longer a client of the lawyer. Consequently, any communication by the lawyer to the former plan member may be construed as solicitation. This is unrealistic because the individual cannot be expected to maintain a record of his legal coverage, and he may fully intend to renew his plan membership. This is a very real problem for the plan lawyer. Future regulations should allow the lawyer to at least inform the plan member that his coverage is due to expire.

VII. CONCLUSION

The foregoing discussion certainly does not amount to a handbook or guide to the operation of prepaid legal service plans. Hopefully it will provide a better understanding of the concepts involved and the problems likely to be encountered. Additional study is obviously needed in this area as other problems present themselves. Future changes in the CPR are likely to occur in areas affected by plan promotion. In *Virginia Citizens Consumer Council v. Virginia State Board of Pharmacy*,⁸⁷ a three-judge federal court held that a

⁸⁷ 373 F. Supp. 683 (E.D. Va. 1974); *probable jurisdiction noted*, 95 S. Ct. 1389 (1975).

Virginia statute which prohibited pharmacists from advertising the price of prescription drugs violated consumers' first amendment rights to receive such information. The case will be argued before the Supreme Court of the United States. The Attorney General of Virginia has said that "[i]f this statute goes, so do all the statutes prohibiting advertising and soliciting by lawyers, doctors and everybody else."⁸⁸ Such a statement is startling, since the bar has traditionally abhorred any form of advertisement. However, the "consumerism" era is upon us and such statements are becoming more commonplace. The prepaid legal service plans represent evidence of this consumerism movement gaining a foothold in our profession. No wonder that this concept is one of the most controversial in the profession.

The present disciplinary rules seem to be only the beginning in a long process of defining permissible prepaid legal services. Such plans are now sanctioned and being demanded by those who find it difficult to afford the high cost of legal services. The bar, as a whole, must now educate itself and the public as to this concept. In addition, it must help define clear standards which will preserve the integrity of the Bar without inhibiting the orderly development of prepaid legal services.

⁸⁸ Morrison, *Ethical Resolutions-Comment*, TRANSCRIPT OF PROCEEDINGS 5TH NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, 142 (May 1975).